ATTORNEY FOR APPELLANT:

JAMES R. REED
Morocco, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JOEY HIGGINS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 56A03-0605-PC-206
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE NEWTON SUPERIOR COURT
The Honorable Daniel J. Molter, Judge
Cause No. 56D01-8808-CF-38

October 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Joey M. Higgins ("Higgins") appeals the sentence imposed following his plea of guilty to Murder, a felony.[1] We affirm.

Issues

Higgins presents four issues for review, which we consolidate and restate as three:

I. Whether his fifty-two-year sentence was imposed in violation of his Sixth Amendment rights;[2]

II. Whether the trial court relied upon improper sentencing aggravators; and

III. Whether the trial court erroneously failed to find that Higgins' guilty plea was a sentencing mitigator.

Facts and Procedural History

On January 9, 1988, Higgins killed nineteen-year-old Francis Perrin, III ("Perrin"). Higgins shot Perrin in the neck, disabling him, and then placed Perrin in the trunk of Higgins' car. Higgins then set the car on fire, causing Perrin to die from carbon monoxide intoxication and incineration of his body. Higgins then fled the State of Indiana and assumed the name "Kevin Harmon." (Tr. 52.)

On August 5, 1988, the State charged that Higgins "knowingly" killed Perrin while committing arson. (App. 301.) On May 25, 1990, the State filed a second count, charging that Higgins murdered Perrin "intentionally" while committing arson. (App. 283.) The State

[1] Ind. Code § 35-42-1-1.

[2] See Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), reh'g. denied, 125 S. Ct. 21 (2004).

contemporaneously filed a Request for Death Sentence pursuant to Indiana Code Section 35-50-2-9.[3]

In 1990, Higgins was arrested and returned to Indiana. On September 17, 1990, he pleaded guilty to Murder, and the State moved to dismiss Count II, alleging intentional murder while committing arson, and the request for the death penalty. The trial court conducted a sentencing hearing on October 22, 1990, and imposed upon Higgins a fifty-two year sentence.

Thereafter, Higgins challenged his sentence by filing several pro se motions, without success. On January 6, 2006, Higgins filed a petition for permission to file a belated notice of appeal. The trial court conducted a hearing on the motion on March 10, 2006. At its conclusion, the trial court issued an order granting Higgins permission to file a belated notice of appeal. Higgins filed his belated notice of appeal on April 7, 2006.

Discussion and Decision

I. Alleged Blakely Violation

When Higgins was sentenced, Indiana Code Section 35-50-2-3 provided that the presumptive term of imprisonment for murder was forty years, to which up to twenty years could be added for aggravating circumstances. In imposing an enhanced sentence of fifty-two years upon Higgins, the trial court found three aggravating facts: "that the Defendant intentionally and willfully attempted to conceal the crime, that the crime was of such heinous nature that to lessen the sentence further would depreciate the nature of the crime, [and] that

[3] Indiana Code Section 35-50-2-9(b)(1)(A) provides that the death penalty may be sought when the State is able to prove beyond a reasonable doubt that the defendant committed murder by intentionally killing the

the Defendant or his dependents stood to gain financially by the commission of the crime." (App. 239.) The trial court also found three mitigating facts: "prior to and immediately before commission of the crime the Defendant remained gainfully and steadily employed, that prior to the commission of the crime the Defendant was a suitable parent and dutifully supported his three minor children, and that the Defendant has virtually no prior criminal record." (App. 239.)

Higgins now claims, in reliance upon Blakely, that his aggravated sentence was imposed in contravention of his Sixth Amendment right to have the facts supporting the enhancement of his sentence tried to a jury. The Blakely court applied the rule set forth in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." The Blakely court defined the relevant statutory maximum for Apprendi purposes as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 124 S. Ct. at 2537.

In Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005), the Indiana Supreme Court held Blakely applies to Indiana's sentencing scheme. Thus, in the wake of Blakely, a trial court may only enhance a sentence based upon those facts that "are established in one of several ways: 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty

---

victim while committing or attempting to commit Arson.

plea where the defendant has waived Apprendi rights and stipulated to certain facts or consented to judicial factfinding." Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005).[4]

The defendant need not admit the precise language of the aggravating circumstance; rather, the critical inquiry for Sixth Amendment purposes is whether the facts that underlie and support the aggravating factor were admitted by the defendant or found by a jury. See Morgan v. State, 829 N.E.2d 12, 17-18 (Ind. 2005). "Sixth Amendment rights are not implicated when the language of an aggravator is meant to describe the factual circumstances, not to serve as a fact itself." Id. at 17. See also Mitchell v. State, 844 N.E.2d 88, 91 (Ind. 2006) (observing that the defendant's role as a major participant and his planning and conspiring to commit a robbery "could well serve as aggravators had they been admitted by the defendant").

Here, Higgins testified at the sentencing hearing in pertinent part as follows:

[4] The State argues that Higgins cannot invoke Blakely because his sentencing hearing was conducted in 1990. We disagree. The Indiana Supreme Court's rule that precludes retroactive application of new criminal rules to collateral proceedings does not apply to direct appeals brought pursuant to Post-Conviction Rule 2. Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005) (citing Fosha v. State, 747 N.E.2d 549, 552 (Ind. 2001) (holding that defendant's claim based on Richardson v. State, 717 N.E.2d 32 (Ind. 1999), would be considered on the merits, where defendant was convicted in 1993 and did not originally timely file a direct appeal but in 1999 was granted permission to file a belated appeal)). "New rules for the conduct of criminal prosecutions are to be applied retroactively to cases pending on direct review or not yet final when the new rules are announced." Powell v. State, 574 N.E.2d 331, 333 (Ind. Ct. App. 1991), trans. denied. Post-Conviction Rule 2(1) provides in pertinent part: "If the trial court finds grounds, it shall permit the defendant to file the belated notice of appeal, which notice of appeal shall be treated for all purposes as if filed within the prescribed period." (emphasis added.) Because Higgins was given permission to file this belated direct appeal, he may rely on Blakely even though he was sentenced before it was decided because his case was "not yet final" when Blakely was decided. See Smylie v. State, 823 N.E.2d 679, 690-91 (Ind. 2005), cert. denied, 126 S. Ct. 545 (2005) (holding that defendants sentenced before Blakely was handed down, but whose appeals were "on direct review" on that date, may raise a Sixth Amendment challenge to his or her sentence for the first time on appeal). See also Gutermuth v. State, 848 N.E.2d 716 (Ind. Ct. App. 2006) (concluding that the appellant bringing a belated direct appeal was entitled to the retroactive application of Blakely because his case was not yet final when Blakely was decided), trans. granted. But see Hull v. State, 839 N.E.2d 1250, 1256 (Ind. Ct. App. 2005) and Robbins v. State, 839 N.E.2d 1196, 1199 (Ind. Ct. App. 2005).

Q: And you had approximately $60,000 worth of recently purchased life insurance when you left Indiana, is that correct?

A: If that's what it was, yes.

(Tr. 48.) * * *

Q: And the purpose of putting Mr. Perrin in the trunk and – and burning him to death was so that people would think that he was you, is that correct?

A: Yes.

(Tr. 46.) * * *

Q: Now, on the – on the day that you killed Mr. Perrin, describe what happened once you got in Indiana. How did you set this fire?

A: Opened the can of black powder and put a lit cigarette with the filter end down into the lid of it. . . . Then I unscrewed it, the top. Lit a cigarette, put the filter in, into it. I had a Coleman stove in there. And undid the top of that and put the gasoline on the seats, emptied it out.

Q: You emptied the fuel from the Coleman stove onto the seats of the car?

A: Right.

Q: This was after you had put Mr. Perrin in the trunk of the car, shut the trunk?

A: Right.

Q: Then you lit the cigarette and turned it around, inverted it, and stuck it in the can of black powder?

A: Right.

Q: That acted kind of as a fuse?

A: Yes.

(Tr. 59-60.) Additionally, Higgins admitted that he had shot Perrin and disabled him before placing him, still alive, in the trunk. He further admitted that he assumed the identity of a former co-worker whose Social Security number he had obtained. As such, Higgins admitted that he burned Perrin to death, and that the incineration was motivated by his hope that he, rather than Perrin, would be presumed dead. He also admitted the existence of a recently procured life insurance policy payable upon his death.

These facts admitted by Higgins are the facts relied upon by the trial court to articulate the particular aggravators of heinousness, concealment, and potential financial gain. It is of no moment that Higgins did not actually obtain insurance funds as a result of the murder; had his concealment efforts successfully led investigators to presume that he was the decedent, his family stood to gain $60,000.00. The Sixth Amendment is not implicated because the underlying facts supporting the aggravators were admitted by Higgins. See Morgan, 829 N.E.2d at 17.

II. Allegedly Improper Aggravators

Higgins next argues that the trial court abused its sentencing discretion by relying upon improper considerations, i.e., his death penalty eligibility and the need to send a message to society. Higgins concedes that the trial court did not specifically find these to be aggravating circumstances, but argues that the trial court's improper focus was "obvious" and "apparent" from the trial court's comments made at the sentencing hearing. Appellant's Br. at 8, 12.

At the time of Higgins' sentencing, trial courts were empowered with the discretion, within statutory limits, to determine the appropriate sentence for a defendant, including the discretion to find and weigh the aggravating and mitigating factors, if any. Corbett v. State, 764 N.E.2d 622, 630 (Ind. 2002). We review the trial court's determination for an abuse of that discretion. Id.

The presumptive sentence was meant to be the starting point for a court's consideration of the appropriate sentence for the crime committed. Meadows v. State, 785 N.E.2d 1112, 1128 (Ind. Ct. App. 2003), trans. denied. When the court then considers deviation from the presumptive sentence, the court looks to the character of the offender and the nature of the offense within the category charged. Id.

Aside from addressing the three specific aggravators identified in its sentencing order, the trial court observed that Higgins had previously faced the death penalty, and also stated that part of the trial court's "job here today" was to "send a message to society." (Tr. 91.) However, it does not appear that the trial court imposed the sentence selected based on either of those considerations. Indeed, the trial court elected not to impose a maximum sentence of sixty years for Murder, which would arguably send a stronger message to society. Instead, in imposing the fifty-two year sentence, the trial court articulated three aggravating circumstances supported by the record, heinousness,[5] concealment, and potential financial

[5] We disagree with Higgins' characterization of this aggravator. He argues that the trial court's language "the crime was of such a heinous nature that to lessen the sentence further would depreciate the nature of the crime," (App. 241), is ambiguous but approximates language employed by a trial court when considering a reduced sentence, a circumstance not applicable here. However, the Indiana Supreme Court has held that it is not error to enhance a sentence based upon an aggravating circumstance that a sentence less than the enhanced term would depreciate the seriousness of the crime committed. Walter v. State, 727 N.E.2d 443, 447 (Ind. 2000) (emphasis added). When reviewing a sentencing statement, we are not limited to the written

gain. A trial court could properly rely upon a single aggravating circumstance to support an enhanced sentence. Veal v. State, 784 N.E.2d 490, 494 (Ind. 2003). As such, Higgins has demonstrated no abuse in the trial court's sentencing discretion.

III. Guilty Plea as Mitigator

Finally, Higgins argues that the trial court erroneously failed to find his guilty plea to be a mitigating circumstance.

The finding of mitigating factors is not mandatory and rests within the discretion of the trial court. Wingett v. State, 640 N.E.2d 372, 373 (Ind. 1994). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Additionally, trial courts are not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. Id.

Higgins argues that the trial court should have been inherently aware that his guilty plea was a significant mitigator. Indiana courts have recognized that a guilty plea is a significant mitigating factor in some circumstances because it saves judicial resources and spares the victim from a lengthy trial. Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004). Where the State reaps a substantial benefit from the defendant's act of pleading guilty, the

---

sentencing order but may examine the record as a whole to determine whether the trial court made a sufficient statement of its reasons for selecting the sentence imposed. Kinkead v. State, 791 N.E.2d 243, 248 (Ind. Ct. App. 2003), trans. denied. Here, we are convinced from the record as a whole that the trial court was considering an enhanced term and in so doing was addressing the nature and circumstances of the crime, including the particular heinousness of setting fire to a person who was alive, disabled by a bullet, and locked in a trunk.

defendant deserves to have a substantial benefit returned. Sensback v. State, 720 N.E.2d 1160, 1164 (Ind. 1999). However, a guilty plea is not automatically a significant mitigating factor. Id. at 1165. Here, the record demonstrates that the State requested dismissal of Count II, charging an "intentional" killing while committing arson, and withdrew its request for the death penalty in exchange for Higgins' plea of guilty to Murder. Ultimately, he received a sentence of fifty-two years, as opposed to the death penalty he potentially faced if convicted as charged. Because Higgins reaped a substantial benefit from his decision to plead guilty, the trial court did not abuse its discretion by failing to accord his guilty plea additional mitigating weight at sentencing.

Conclusion

In light of the foregoing, Higgins has not established that the trial court erred in imposing upon him a fifty-two-year sentence for Murder.

Affirmed.

RILEY, J., and MAY, J., concur.